IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DEBORAH LYNN CARGO, Appellant.	No. 37547-8-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Deborah L. Cargo appeals her conviction for possession of a controlled substance–methamphetamine.[1] She argues that the jury instructions are erroneous because they allowed the jury to find her guilty if she merely had dominion and control of her car in which police found the methamphetamine, instead of having dominion and control of the methamphetamine itself. As the jury instructions were proper, we affirm. We also deny Cargo's motion to file supplemental briefing on the applicability of *Arizona v. Gant*, __ U.S. __, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

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[1] Cargo was also convicted for violating a no-contact order under RCW 26.50.110(1), but she does not appeal that conviction.

FACTS

At 6:30 am on August 13, 2007, Sequim Police Office Anthony Graham ran a license plate check on a Honda Civic that was parked in a Wal-Mart parking lot. He saw a man and a woman inside. Graham learned that the car was registered to Cargo and he ran a check on her for officer safety. He discovered that there was a protection order regarding Cargo and Michael Lyman. Graham approached the car and recognized Lyman sitting in the passenger seat.

Officer Graham arrested Lyman for violating the protection order, but Lyman said that the order protected him from Cargo's contact. Graham confirmed this fact, released Lyman, arrested Cargo, and put her in the back of his police car. Graham then searched the car.[2] He found a pouch in the car containing suspected drug paraphernalia and some residue inside a tin. Graham also found a brown leather purse in between the front seats which contained Cargo's driver's license and white powder inside a folded piece of paper. And he found two pipes in the car, one containing white residue, and a cut straw in the car's glove box. The crime laboratory concluded that one of the pipes contained methamphetamine residue and the folded paper from the purse contained less than .1 gram of methamphetamine.

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[2] Officer Graham testified that he conducted the search incident to arrest. On May 4, 2009, Cargo moved for permission to file a supplemental brief on the applicability of *Gant*, 129 S. Ct. 1710, a case in which the United States Supreme Court held that the State may not conduct a warrantless search incident to arrest of a suspect's automobile when the search will not yield evidence of the arrestable offense and no other warrant exception applies. But Cargo did not move to suppress the evidence against her in the trial court. Thus, this issue is reviewable only if it is a manifest error affecting a constitutional right. RAP 2.5(a). No error is manifest because there was no motion below to suppress the evidence and, as a result, the facts necessary to resolve whether the search was valid were never adduced in the lower court. The State was not given the opportunity to argue whether any other exceptions to the warrant requirement justified this search. Accordingly, we deny Cargo's motion. *Accord State v. Millan*, No. 37172-3-II, 2009 WL 2414850 (Wash. Ct. App. Aug. 7, 2009).

The State charged Cargo with possession of a controlled substance–methamphetamine (count I) and violating a protection order (count II). At trial, Cargo testified that she was living in her car and kept her possessions in it.[3] She said that she had loaned her car to a friend, never saw the pipe that contained methamphetamine residue, had never used methamphetamine, and believed someone planted the methamphetamine in her car.

Cargo proposed a jury instruction that stated, "[p]ossession of a controlled substance may not be established merely by the defendant['s] dominion or control over the area where such substance is found." Clerk's Papers (CP) at 50. The trial court rejected this instruction over the defense's objection. Instead, the trial court instructed the jury that, to convict on count I, it must find that Cargo "possessed a controlled substance" in Washington on August 13, 2007. CP at 35. And the jury instructions defined "possession" as follows:

> Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Proximity alone without proof of dominion and control over the substance is insufficient to establish constructive possession. Dominion and control need not be exclusive to establish constructive possession.

CP at 37; *see* 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 50.03, at 949 (3d ed. 2008) (WPIC).

Cargo did not request, and jury instruction 9 did not contain, the third paragraph of WPIC 50.03, which is bracketed to indicate that the language is optional and appropriate as the facts dictate. It reads:

[3] Cargo did not move to suppress the evidence against her before trial under CrR 3.6 and she does not challenge the admissibility of evidence in her initial appeals briefing.

> [In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include [whether the defendant had the [immediate] ability to take actual possession of the substance,] [whether the defendant had the capacity to exclude others from possession of the substance,] [and] [whether the defendant had dominion and control over the premises where the substance was located]. No single one of these factors necessarily controls your decision.]

WPIC 50.03. Instructions on the use of WPIC 50.03 advise that for cases

> involving actual possession, the instruction may need to include only the first sentence [of the first paragraph]. For cases involving constructive possession, the instruction should include the full first paragraph along with the other bracketed options that relate to the issues involved in the particular case.

WPIC 50.03, note on use at 949.

The jury found Cargo guilty on both counts.

ANALYSIS

Cargo argues that the jury instructions misstated the law, were confusing, and did not allow her to argue her case theory that the State proved only dominion and control over the car and not the methamphetamine. We disagree.

When taken as a whole, jury instructions must properly inform the jury of the applicable law, may not be misleading, and must permit each party to argue its theory of the case. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999) (citing *State v. Theroff*, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980)). We review the validity of jury instructions de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *State v. Shumaker*, 142 Wn. App. 330, 333, 174 P.3d 1214 (2007).

In *Shumaker*,[4] Division Three of this court recently held that the State may not obtain a

[4] In *Shumaker*, Division Three of this court overruled its contrary holding in *State v. Ponce*, 79 Wn. App. 651, 904 P.2d 322 (1995), and readopted earlier case law that *Ponce* had, in turn,

conviction for possession of a controlled substance if it proves only that the defendant had dominion and control over the premises where the substance was found, rather than over the substance itself. Charles Shumaker's jury was instructed that constructive possession occurs when there is "no actual physical possession, but there is dominion and control over the substance *or the premises* upon which the substance is found." *Shumaker*, 142 Wn. App. at 332 (emphasis added). The *Shumaker* court remanded for retrial on the possession charge because that jury instruction misstated the law. 142 Wn. App. at 334-35.

Our appellate courts are split on whether proof that the defendant had dominion and control of the premises where police found a controlled substance proves, creates a presumption, or is merely circumstantial evidence that the defendant possessed the substance. Douglas J. Ende & Seth A. Fine, 13A Washington Practice: Criminal Law § 906, at 173-75 (2d ed. 1998). It is also unclear whether law regarding premises applies to this case. Police found the methamphetamine inside Cargo's car and cars are not generally "premises," but Cargo lived in her car and, therefore, it may legally be premises. *See* 11A WPIC 65.01, at 35 (3d ed. 2008) (defining "premises" for purposes of burglary and criminal trespass as including "any building, dwelling, . . . or any real property"). To further complicate the matter, there is apparently no dispute that the purse that contained methamphetamine belonged to Cargo and a purse is obviously not premises. For the sake of argument, we apply *Shumaker* to the present case despite these questions because, even under that law, which is most favorable to Cargo, her argument fails.

The jury instructions here are proper. They informed the jury that constructive possession

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overruled, *State v. Olivarez*, 63 Wn. App. 484, 820 P.2d 66 (1991). 142 Wn. App. at 334.

occurs "when there is no actual physical possession but there is dominion and control over the substance." CP at 37. The instructions also specify that "[p]roximity alone without proof of dominion and control over the substance is insufficient to establish constructive possession." CP at 37. Clearly, these instructions did not allow the jury to find Cargo guilty unless the State proved that she had dominion and control over the substance, methamphetamine, rather than the car in which the methamphetamine was found.[5]

The heart of Cargo's argument turns not on a misstatement of law, but rather on the role that circumstantial evidence plays in a case such as this. The State did not have direct evidence that Cargo possessed the drugs, so it asked the jury to infer that she had dominion and control over the drugs based on evidence that the car belonged only to her, she lived in it, she kept her possessions in it, and she was inside the car very shortly before the police found the drugs. The trial court properly instructed the jury that it could rely on circumstantial evidence, which is "evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience." CP at 33. Despite Cargo's argument to the contrary, the State's reliance on circumstantial evidence does not render these jury instructions improper. There is no error here.

We deny Cargo's motion to supplement her briefing on an issue not preserved for review and affirm the judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so

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[5] In fact, the instructions given in this case are exactly those that the *Shumaker* court approved. The definition of constructive possession is identical to the one that Shumaker's defense counsel proposed and the court agreed with Shumaker's appellate counsel that proximity alone does not establish constructive possession. *Shumaker*, 142 Wn. App. at 333.

ordered.

QUINN-BRINTNALL, J.

We concur:

HOUGHTON, J.

PENOYAR, A.C.J.